44440 SERVICE DATE – LATE RELEASE MAY 15, 2015
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 726

ON-TIME PERFORMANCE UNDER SECTION 213 OF THE PASSENGER RAIL INVESTMENT AND IMPROVEMENT ACT OF 2008

Digest:[1] The Board institutes a rulemaking proceeding to define "on-time performance" for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 49 U.S.C. § 24308(f).

Decided: May 13, 2015

On January 15, 2015, the Association of American Railroads (AAR) submitted a conditional petition for rulemaking to define "on-time performance" for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24308(f). AAR asks the Board to grant its petition only in the event the Board does not grant Canadian National Railway's (CN) pending petition for reconsideration in Docket No. NOR 42134 and the pending motions to dismiss of CSX Transportation, Inc. (CSXT) and Norfolk Southern Railway Company (NS) in Docket No. NOR 42141.

On February 3, 2015, NS submitted a reply in support of AAR's petition. On February 4, 2015, the National Railroad Passenger Corporation (Amtrak) and the Oregon Department of Transportation submitted replies in opposition to AAR's petition, and the Washington State Department of Transportation submitted a letter expressing concern about the requested rulemaking. On February 9, 2015, the Michigan Department of Transportation submitted a letter in opposition to AAR's petition.

For the reasons discussed below, AAR's petition will be granted.

BACKGROUND

On January 19, 2012, Amtrak filed a petition in Docket No. NOR 42134 requesting that the Board initiate an investigation pursuant to Section 213 of PRIIA, 49 U.S.C. § 24308(f), regarding the alleged "substandard performance of Amtrak passenger trains" on rail lines owned

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

by CN.[2] Five months earlier, the Association of American Railroads (AAR) had filed a lawsuit in the United States District Court for the District of Columbia challenging the constitutionality of Section 207 of PRIIA, which provides that Amtrak and the Federal Railroad Administration (FRA) shall "jointly" develop or improve metrics and standards for measuring the performance of passenger rail operations. Ass'n of Am. R.Rs. v. DOT, 865 F. Supp. 2d 22 (D.D.C. 2012).

While Amtrak's complaint before the Board was in abeyance at the parties' request for purposes of mediation, the District Court, on May 31, 2012, upheld the constitutionality of Section 207. Id. at 22.[3] Mediation ultimately was unsuccessful, and on November 5, 2012, the Board issued a notice that agency proceedings had been reactivated. On February 6, 2013, the parties jointly moved to stay the proceeding and hold it in abeyance because the parties were in productive discussions towards addressing the issues raised in the complaint. The Board granted the request for abeyance, as well as later joint requests to extend the abeyance. The last of these extensions ended on July 31, 2014. On July 21, 2014, Amtrak notified the Board that it intended to amend its complaint.

Meanwhile, on February 19, 2013, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's ruling, holding that Section 207 of PRIIA impermissibly delegates regulatory authority to a "private entity" (Amtrak) and therefore is an unconstitutional delegation of legislative power. Ass'n of Am. R.Rs. v . DOT, 721 F.3d 666 (D.C. Cir. 2013). The U.S. Department of Transportation petitioned the United States Supreme Court for a writ of certiorari, which the Court granted on June 23, 2014.

On December 19, 2014, the Board issued a decision (December 2014 Decision) in Docket No. NOR 42134 granting Amtrak's request to amend its complaint and concluding that the pending court litigation involving the constitutionality of Section 207 did not preclude the case before the Board from going forward. The Board also sought the parties' views regarding how to construe the term "on-time performance" as the term is used in PRIIA Section 213, 49 U.S.C. § 24308(f). The Board directed the parties to provide opening arguments and replies addressing this question. Then-Commissioner Begeman dissented, stating, among other things, that the Board would best fulfill its obligations under the law by initiating a rulemaking to establish clear standards by which on-time performance cases could be fairly processed, rather than defining on-time performance within the adjudication in Docket No. NOR 42134.

CN petitioned for reconsideration of the December 2014 Decision on January 7, 2015. On January 12 and 13, 2015, NS and CSXT, respectively, petitioned to intervene in Docket No. NOR 42134 for the limited purpose of determining the definition of on-time performance under Section 213. Both NS and CSXT requested that the Board revise the procedural schedule set by the December 2014 Decision to provide parties additional time to prepare comments. On January 16, 2015, the Board served a decision postponing the deadlines established by the

[2] Amtrak Complaint, NOR 42134, at 2 (Jan. 19, 2012).

[3] Shortly thereafter, AAR appealed the District Court's decision to the United States Court of Appeals for the District of Columbia Circuit.

December 2014 Decision for opening arguments and replies addressing the definition of on-time performance, pending further order of the Board.

On March 9, 2015, the Supreme Court vacated the D.C. Circuit's conclusion that Amtrak is a private entity for purposes of determining the constitutionality of Section 207. DOT v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015). However, the Supreme Court remanded the case to the D.C. Circuit for consideration of AAR's other arguments regarding the constitutionality of Section 207. Id. at 1234.

In Docket No. NOR 42141, Amtrak filed a complaint on November 17, 2014, requesting that the Board initiate an investigation pursuant to Section 213 regarding the alleged "substandard performance of Amtrak's Capitol Limited service between Chicago, IL and Washington, D.C." on rail lines owned by CSXT and NS. On January 7, 2015, NS and CSXT each moved to dismiss Amtrak's complaint. On April 7, 2015, the Board served a decision directing the parties to engage in mediation, which is ongoing.

DISCUSSION AND CONCLUSIONS

AAR submitted its petition subject to a condition: AAR requests a rulemaking only if the Board does not grant the petition for reconsideration and motions to dismiss in Docket Nos. NOR 42134 and NOR 42141, respectively. The Board has not ruled on these pleadings. However, AAR's petition raises a number of important issues, and therefore, the Board will institute a rulemaking proceeding and invite public participation.

We acknowledge that circumstances have changed since the Board issued the December 2014 Decision: the Supreme Court has vacated the D.C. Circuit's decision, so there is no longer a judicial decision in effect holding Section 207 unconstitutional. However, the Supreme Court's remand for consideration of other constitutional challenges to Section 207 means that the provision remains subject to an uncertainty that we must consider in addressing the proceedings before us.

If the Board adjudicated Amtrak's complaints relying solely on Section 207 metrics and standards that were ultimately held unconstitutional, and if Amtrak succeeded in demonstrating a violation of the statutory preference under 49 U.S.C. § 24308(c), the parties and the Board would have expended substantial effort and expense without an enforceable result. And if the Board were to postpone consideration of all Amtrak complaints until the constitutionality of Section 207 is entirely resolved, it would mean no action on Amtrak's on-time performance claims for the duration of the D.C. Circuit remand and any potential further appeals to the Supreme Court. As the Board stated in the December 2014 Decision, Congress placed importance on the efficient adjudication of on-time performance, and taking no action for an indefinite—and potentially lengthy—period of time would not be consistent with that intent. December 2014 Decision at 8 (citing S. Rep. 110-67, at 26 (May 22, 2007)), 10-11.

Thus, we conclude that adjudication of Amtrak's complaints under the present circumstances should include analysis under a definition of on-time performance developed by the Board pursuant to Section 213. While we continue to recognize the importance of acting on

Amtrak's complaints efficiently, and are aware that there is no requirement that the Board proceed by rule, we also find persuasive AAR's and NS's arguments regarding the advantages of rulemaking in this situation. Specifically, there are multiple on-time performance cases pending in which the Board's definition could apply; it is efficient to obtain the full range of stakeholder perspectives in one docket, rather than piecemeal on a proceeding-by-proceeding basis; and the definition adopted by the Board could affect a significant portion of the railroad industry.

Amtrak argues that, if Congress had intended on-time performance under Section 213 to be defined by rulemaking, it would not have set forth a specific percentage as a trigger.[4] Similarly, Amtrak asserts that, because Section 207 requires consultation with a range of stakeholders and Section 213 does not, Congress must have intended the first clause of Section 213 to apply without a rulemaking.[5] But Section 213 does not define the on-time performance to which its specific 80 percent threshold applies, and we do not share Amtrak's view that the consultation requirement in Section 207 limits the Board's discretion to choose between adjudication and rulemaking under Section 213. Rather, in requiring stakeholder consultation under Section 207, Congress limited the procedural discretion of FRA and Amtrak, and it imposed no such limitation on the Board under Section 213. Under these circumstances, defining on-time performance by rulemaking is appropriate and consistent with Congressional intent.

Amtrak also argues that it would be better to define on-time performance with the factual predicate of a pending case.[6] We recognize that the experience gained by adjudicating certain cases, depending on the issues in question, can provide a valuable benefit in crafting a generally applicable rule. In this instance, however, the advantages of rulemaking addressed above, including efficiency, outweigh the benefit of case experience.

Amtrak further asserts that a definition of on-time performance adopted in adjudication would not have industry-wide impact because it would only establish the trigger for an investigation, and any penalties would depend on the investigation and its results.[7] But the initiation of an investigation could have an impact in itself—for example, litigation costs—and it is not unreasonable to consider a full range of perspectives in establishing the trigger for that impact. Also, as Amtrak acknowledges, if the Board defined on-time performance in adjudication, another party in a later case could argue for a different definition based on the factual predicate of that case.[8] Thus, acting by adjudication here could increase, rather than decrease, the potential industry impact in the form of litigation costs in future cases. By contrast, clarity regarding the trigger in all cases, provided by rulemaking, would avoid the potential re-litigation of the trigger in each case, conserving party and agency resources.

---

[4] Amtrak Reply 6.

[5] Id.

[6] Id. at 6, 9.

[7] Id. at 8-9.

[8] Id. at 7, 13 n.11, citing Shell Oil Co. v. FERC, 707 F.2d 230, 236 (5th Cir. 1983).

Therefore, we conclude that it is appropriate to institute a proceeding to define on-time performance for purposes of PRIIA Section 213. The Board intends to issue a notice of proposed rulemaking and a procedural schedule in a subsequent decision.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 C.F.R. § 1110.2(e), a proceeding is instituted to consider the issues raised in AAR's petition.

2. This decision is effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.